

## Legal Update

Good morning ladies and gentlemen, my name is Adam Silva and I am the summer legal intern here at the Delta Council. There are two recent cases that Mr. Stevens and I would like to bring to your attention at today's meeting.

### Constitutional Principle of Reasonable Use and the Public Trust Doctrine apply to Riparian users

First, you may recall that the Delta Reform Act (specifically Water Code Section 85023) states the constitutional principle of Reasonable Use and the Public Trust Doctrine are foundational for Delta water management. The same principle is reflected in the Delta Plan. We would like to draw your attention to the recent First District Court of Appeals decision in Rudolph H. Light v. State Water Resources Control Board. You may remember this case involved the stranding and killing of roughly 25,000 juvenile salmonids in the Russian River after numerous riparian vineyards withdrew water at the same time to apply to their vines for frost protection.

While the Russian River itself does not flow into the Delta, there are several important points relied on by the court that are relevant to the management of Delta water, particularly regarding reasonable use, the public trust doctrine, and the adequacy of the EIR prepared by the SWRCB.

Regarding the stranding, the SWRCB prepared an Environmental Impact Report and ultimately issued "Regulation 862." Regulation 862 delegates the monitoring of water levels and the implementation of "corrective action plans" to local entities, who are in turn subject to SWRCB oversight and approval. Regulation 862 declares that the failure to develop a corrective action plan or a diversion of water contrary to such a plan is an unreasonable method of diversion and a violation of Water Code Section 100, rendering the diverter subject to SWRCB enforcement.

This subject is nothing new in California water law. Forty years ago, in the case of State Water Resources Control Board v. Forni, a California Appellate Court upheld the board's authority to designate diversions for frost protection as an "unreasonable use." This case confirms the principles in Forni by stating the Board's power to designate an unreasonable use extends over riparian and early appropriative right holders. In this case, the Court of Appeals reversed the Trial Court and held: 1). The board was able to enact these regulations through its regulatory powers and through the pursuit of judicial and quasi-judicial proceedings, 2). The board had the power to prevent riparian users and early appropriators from using the water in an unreasonable manner, and 3). The Board did not unlawfully delegate its authority by requiring the local entities to formulate the corrective action plans.

In referencing the prohibition of unreasonable use found in Article X, Section 2, the Court of Appeals noted that the Water Code vests broad adjudicatory and regulatory authority to the

board coincident with that of the Legislature. This means the Board will have very broad power in terms of managing what is or is not a “reasonable use” of Delta Water.

In terms of the Public Trust Doctrine, the Court of Appeals cites to the Audubon Society case which held that the “state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”

In discussing the adequacy of an EIR, the Court of Appeals stated from the case of California Oak Foundation v. Regents of University of California that “the overriding issue on review is whether the lead agency reasonably and in good faith discussed a project in detail sufficient to enable the public to discern from the EIR the analytic route the agency traveled from evidence to action.”

Again, while this case does not directly impact the Delta, the underlying principles are relevant to the management of Delta water as stated in the Delta Reform Act and reflected in the Delta Plan.

#### Temporary Water Transfers and compliance with the Federal National Environmental Policy Act

Second, you may recall that in the Delta Plan regulations, temporary (up to 1 year) water transfers are included- until January 1, 2017- among certain categories of projects that don’t meet the “significant impact” criterion for being a “covered action.” The Council contemplated that any extension beyond January 1, 2017 would be based on recommendations from a joint DWR/State Water Board work group on water transfers, including measures to streamline transfers and protect water rights and environmental resources, and to address potential issues with recurring temporary transfers and better transparency.

A case recently filed in the United States District Court Eastern District of California challenges, on environmental grounds, a significant proposed North of Delta to South transfer to be facilitated by the Bureau of Reclamation. Depending on how the case is ultimately decided, it may be informative for purposes of future Council deliberations regarding water transfers under the Delta Plan regulations.

The case, titled Aqualliance and California Sportfishing Protection Alliance v. United States Bureau of Reclamation, involves a proposed water transfer for the summer of 2014 of up to 175,226 acre-feet primarily from Shasta Reservoir to buyers within the San Luis & Delta-Mendota Water Authority, which encompasses portions of San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito, and Santa Clara counties. In facilitating the proposed transfer, the Bureau conducted an environmental assessment under NEPA, and ultimately issued a finding of

no significant impact, meaning they were not required to conduct an environmental impact statement.

The Plaintiffs are two organizations made up of individuals who live, work, and recreate in the Delta, as well as depend on Sacramento Valley groundwater for their livelihood.

The Plaintiffs' main allegations are as follows:

- The Bureau relied on insufficient and improper data when making its finding of no significant impact. After the Bureau issued its finding of no significant impact, the State Water Resources Control Board and United States Geological Survey issued new information that showed the environmental conditions surrounding the proposed transfer were in a much more precarious situation than originally thought. The Plaintiffs allege that the Bureau should have prepared a supplemental Environmental Assessment and/or a full Environmental Impact Statement taking into consideration the new information provided by the Board and the USGS.

- Contrary to the Bureau's opinion, the proposed transfer does constitute a major federal action under NEPA. Because NEPA requires a federal agency to prepare a "detailed statement" discussing the environmental effects of, and reasonable alternatives to, all major federal actions significantly affecting the quality of the human environment, the Plaintiffs contend that the Bureau's finding of no significant impact was insufficient under NEPA given the size of the proposed transfer and its potential environmental impacts.

- The Bureau failed to take a hard look at the proposed project's potential impacts on the environment, particularly groundwater levels and the Delta Smelt.

The Plaintiffs are asking the court to vacate the Bureau's initial findings as arbitrary and capricious, as well as prevent the Defendants from approving any water transfers encompassed by the proposed project until the Bureau can consider the newly available information.

We will monitor this case and keep the council updated as new information becomes available.